

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, et al.)	
)	
Plaintiffs)	
)	
v.)	Case No. 4:05-cv-00329-GKF(PJC)
)	
TYSON FOODS, INC., et al.)	
)	
Defendants)	

**SIMMONS FOODS, INC.'S MOTION FOR PROTECTIVE ORDER
AND RESPONSE TO PLAINTIFF'S MOTION TO COMPEL**

Simmons Foods, Inc. ("Simmons") submits the following in opposition to State of Oklahoma's Motion to Compel Simmons Foods, Inc. to Respond to Discovery Seeking Financial Information (Dkt. No. 1868) ("State's Motion") and moves the Court to deny the State's Motion and enter a protective order in favor of Simmons. Simmons also adopts the arguments and authorities cited by Cargill in its response to the State's Motion (Dkt. No. 1877).

I. Introduction.

As set forth in the State's Motion, it seeks discovery of a multitude of financial documents from Simmons. The State asserts that it is entitled to discovery of all of the documents it seeks because it has alleged it is entitled to recover punitive damages in this case. Simmons denies that the State is entitled to punitive damages and denies that the State will be able to present a *prima facie* case in support of its punitive damages claim. However, Simmons is aware that because the State has made the allegations, Simmons must disclose certain financial information. The parties disagree, however, with regard to

the extent of the financial information Simmons is required to disclose. Simmons has already disclosed more financial information than it is required to disclose yet the State is not satisfied.

As set forth in the State's Motion, it first asked for financial documents in July 2006. (State's Motion p. 2). In its document requests, the State sought "all documents and materials reflecting, referring to or relating to your net worth." Simmons objected to the State's discovery requests because they are overly broad, unduly burdensome, and seek which the State is not entitled to discover. Simmons is a small, family-owned company considers its financial documents proprietary and confidential, particularly in this case in which its co-defendants are competitors. The State's discovery request was not limited to any particular time frame and not limited to balance sheets. In September, 2008, the State served another set of document requests seeking the same financial documents but this time included a time frame of 2002 forward. (State's Motion p. 2). Simmons again objected to the State's requests.

Subsequently, the parties conducted a meet-and-confer concerning the overbreadth of the State's document requests. At that time the State agreed to narrow its request for financial documents. This "narrowed" list of documents the State seeks remains overly broad and seeks documents which it is not entitled to discover. The State's "narrowed" list seeks tax returns, working trial balances, audited and unaudited financial statements, appraisals or estimates of value, business plans, financial projections, forecasts, pro forma financial statements provided to third parties, internal budgets and forecasts. (See letter Claire Xidis to John Elrod, dated October 24, 2008, attached as Ex. D to the State's Motion).

Simmons agreed to produce balance sheets which reflect its net worth for the years 2005, 2006, 2007, and the “most recent one.” Simmons’ position that the law only requires it to produce documents that reflect its current net worth was explained to State’s counsel in the meet-and-confer sessions and in an email from Simmons’ counsel dated November 14, 2008. (Attached to the State’s Motion as Ex. E).

In City of Tulsa, et al v. Tyson Foods, Inc. et al., Case No. 01-CV-900-B, (N.D. Okla.) the parties had a similar discovery dispute. In that case the Court ruled that the defendants (including Simmons) had to produce “documents reflecting their net worth” for the past several years. Despite the fact that more recent decisions have only required the defendant to produce the current year’s balance sheet, Simmons produced its balance sheets not only for 2005 forward, but also produced balance sheets for 2003 and 2004. Simmons’ balance sheets are the documents that reflect its net worth from an accounting standpoint.¹

The State’s Motion should be denied because Simmons has already produced all, if not more than, the information that the State is entitled to receive. The State’s Motion should also be denied because the State filed its motion and seeks additional documents for an improper purpose: to modify and bolster its expert’s opinion when the date for the State to submit its expert reports has long since passed.

II. Argument

1. Simmons has already provided all the financial documents that it is required to provide.

¹ The State did not provide Simmons with a copy of the documents it filed under seal as Exhibit J to its Motion. Simmons presumes that the documents provided to the Court under seal include the identical documents Simmons provided to the State.

A litigant is not entitled to unfettered discovery of information simply because it seeks it. As explained by the Oklahoma Supreme Court in Quinn v. City of Tulsa, 777 P.2d 1331 (Okla. 1989):

But the discovery provisions, like all of the Federal Rules of Civil Procedure are subject to the injunction of Rule 1^{FN25} that they “be construed to secure the just, speedy, and inexpensive determination of every action.” To this end, the requirement of Rule 26(B)(i)^{FN26} that the material sought in discovery be “relevant” should be firmly applied, and the district courts should not neglect their power to restrict discovery where “justice requires [protection for] a party or person from annoyance, embarrassment, oppression, or undue burden or expense....” Rule 26(c).^{FN27} With this authority at hand, judges should not hesitate to exercise appropriate control over the discovery process. (internal citations omitted). *Id.* at 1342 (citing Herbert v. Lando, 441 U.S. 153, 177, 99 S. Ct. 1635, 1649, 60 L.Ed.2d 115 (1979)).

As an initial matter, information sought must be relevant. *Id.* Information relevant to a punitive damages award is the net worth of the defendant. To this end, the Northern District of Oklahoma has ordered a defendant potentially subject to punitive damages to disclose showing its net worth (typically balance sheets) for certain relevant years. E.g., Cardtoons, L.C. v. Major League Baseball Players Ass’n, 199 F.R.D. 677, 686 (N.D. Okla. 2001) (only the relevant year’s balance sheet had to be produced); Hightower v. Heritage Academy of Tulsa, Inc., No. 08-CV-602-GKF-FHM, 2008 WL 2937227, at *1 (N.D. Okla. July 29, 2008) (balance sheet and net worth for current year only); Toussaint-Hill v. Montereau in Warren Woods, No. 07-CV-179 GKF/SAJ, 2007 WL 3231720, at *1 (N.D. Okla. Oct. 29, 2007) (balance sheet showing net worth for a single year)²; City of Tulsa v. Tyson Foods, Inc., No. 01-CV-900-B(X), slip op. at 6

² The Toussaint-Hill court did not require the defendant to produce financial records until after the court made a dispositive ruling to allow plaintiff’s punitive damages claim to proceed.

(N.D. Okla. May 3, 2002) (Dkt. No. 1866-2: Ex. I) (net worth for five years). The Toussaint-Hill Court cited with favor the District of Kansas decision in Heartland Surgical Specialty Hospital, LLC v. Midwest Division, Inc., 2007 WL 950282, at *14 (D. Kan. Mar. 26, 2007). In finding that only the most recent and current financial information is relevant to a punitive damages determination, the District of Kansas noted in that case that “the issue is a party’s ‘financial condition’ not their financial history.” Id.

None of these decisions compelled the parties at issue to produce tax return information, as the State demands here. Further, even where a party specifically sought multiple financial documents – such as income statements, profit and loss statements, and cash-flow statements – as the State does in the instant motion, the Courts all refused and instead narrowly limited the disclosures required. E.g., Cardtoons 199 F.R.D. at 686 n.17; Toussaint-Hill, 2007 WL 3231720, at *1.

The State admits that the documents Simmons provided contain information concerning Simmons’ net worth but the State wants documentation as to Simmons’ income and cash flow. (State’s Motion p. 5). The State cites no legal support for its argument that it is entitled to receive additional financial documentation from Simmons. Instead, the State offers arguments from its expert concerning additional information he would like to have. These are the same types of arguments that were rejected by the courts in Cardtoons, Hightower, Toussaint-Hill, and City of Tulsa, et al v. Tyson Foods, et al., supra. Simply stated Simmons has already provided all of the financial documents it is required to provide. Moreover, Simmons has provided more documentation than is required in that the most recent cases have only required the defendant to produce the

current year's balance sheets and Simmons has provided balance sheets for the years 2002 forward.

2. The State seeks the additional documents for an improper purpose.

The State filed its Motion and seeks additional financial documents from Simmons for the sole purpose of bolstering its expert reports. (State's Motion pp. 5, 8). According to the State, its expert will need to review the documents and "the State anticipates that it will be requesting leave to supplement Mr. Payne's expert report once he has had an opportunity to review this information." (State's Motion p. 8).

Plaintiff's expert damages reports were due January 5, 2009 and on that date Mr. Payne submitted an expert report opining as to what he terms Simmons' "ability to pay."³ The State now seeks additional financial documentation to bolster Payne's opinion.

As an initial matter, the State does not cite any legal authority, and Simmons is not aware of any, that Mr. Payne's opinion as to Simmons' alleged "ability to pay" is a proper measure of punitive damages. In addition, Simmons denies that the issue of the amount of punitive damages to be awarded is a proper topic for expert testimony. See Anderson v. Boeing Co., 02-CV-196-CVM-FHM, 2005 WL 6011245, at *1 (N.D. Okla. Aug. 2, 2005) (punitive damages not a proper subject of expert testimony; it improperly invades the province of the jury).

Moreover, the Court has already ruled that the State cannot issue more expert opinions in this case. (See Jan 29, 2009 Orders: Dkt. Nos. 1839, 1842). In denying the State's request to serve additional supplemental reports, the Court emphasized that "[a] supplemental expert report that states additional opinions or rationales or seeks to

³ Payne made several errors in his methodology and analysis. These errors will be the subject of a later motion Simmons will file challenging the admissibility of Payne's opinion.

‘strengthen’ or ‘deepen’ opinions expressed in the original expert report exceeds the bounds of permissible supplementation and is subject to exclusion under Rule 37(c)(1).” Id. (citing Palmer v. Asarco, Inc., 2007 WL 2254343, at *3 (N.D. Okla. Aug. 3, 2007)). In denying Plaintiffs’ request to alter the Court’s October 8, 2008, ruling barring rebuttal expert reports, the Court found that “[t]o alter the course previously plotted by the scheduling orders entered by the magistrate judge and permit rebuttal expert reports (and, presumably, sur-rebuttal expert reports) at this late date would unduly increase the cost of this litigation and delay its ultimate resolution.” (Jan. 29, 2009 Ord: Dkt. No. 1842 at 2.)

To allow the State to supplement and bolster Payne’s expert report would necessitate modifying the scheduling order. The Defendants would need to re-depose Payne after he issues his new opinions and the Defendants would also need an extension of time to submit their rebuttal reports to Payne’s new opinions. This is exactly the sort of increased costs and delay that the Court sought to avoid in denying the State’s previous attempts to re-open their expert opinions.

MOTION FOR PROTECTIVE ORDER

As stated previously, parties are only entitled to discover information that is relevant to a claim or defense in the case. Fed. R. Civ. P. 26(b)(1). Overly broad discovery requests are not permitted, instead, a party has a duty to craft discovery requests in a manner that describes “with reasonable particularity each item or category” of information sought. Fed. R. Civ. P. 34(b)(1)(A). “[T]he Supreme Court has underscored that ‘the requirements of Rule 26(b)(1) that the material sought in discovery be relevant should be firmly applied, and the district courts should not neglect their power to restrict discovery [to protect] a party or person from annoyance, embarrassment,

[or] oppression” Regan-Touhy v. Walgreen Co., 526 F.3d 641, 649 (10th Cir. 2008) (citing Herbert v. Lando, 441 U.S. 153, 177 (1979)).

The State seeks confidential, proprietary financial information from Simmons far in excess of what the case law allows. The cases clearly establish that the only financial information Simmons is required to disclose to the State is its current net worth. See Cardtoons, Hightower, Toussaint-Hill, supra. Simmons has provided its balance sheets, which contain its net worth, to the State for the past seven (7) years. Clearly, Simmons has more than met its discovery obligation in this matter. Accordingly, Simmons respectfully requests that the Court enter its order protecting Simmons and denying the State’s request for additional financial documents.

Conclusion

The State’s Motion should be denied because (1) Simmons has already provided all of the financial information it is obligated to provide and (2) the State seeks the additional documentation for the improper purpose of bolstering its expert’s opinions after the time for disclosure of expert opinions has passed. Simmons respectfully requests that the Court deny the State’s Motion in full.

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I hereby certify that on 23rd day of February, 2009, I electronically transmitted the foregoing document to the Clerk of the Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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